

A CONFIDENTIALITY GUIDE FOR FEDERAL WORKPLACE ADR PROGRAM ADMINISTRATORS PUBLIC COMMENTS AND RESPONSES

Comments on *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators* (“Confidentiality Guide”) were received from two individuals. Following receipt of public comments, members of the IADRWG Steering Committee provided limited additional suggestions to further clarify the language and intent of the Guide. The following presents the public comments and the responses thereto, and other changes made – that is, how they were reflected within the final version of the Confidentiality Guide.

(1) Commenter #1:

Comment:

In my view, the administrator of a government ADR program is as important, if not more important, to the success of a dispute resolution proceeding (mediation) as the sessions neutral (neutral). Certainly, that could not be more true than in the function of providing appropriate advance disclosures concerning mediation confidentiality to the parties.

Given the complexity of the confidentiality rules for these types of mediation, it would be too late to advise the parties about confidentiality if it is done for the first time at the commencement of the mediation session. At that point, it would take too much time and would be too confusing. Therefore, the practical burden of making disclosures to the parties about confidentiality falls first and foremost on the administrator well in advance of the mediation session. While the Guide calls for the administrator to educate the neutrals about confidentiality, the Guide does not thoroughly assist the administrator in educating the parties about mediation. Much of what follows is my attempt to illustrate ways the administrator can determine the areas where disclosures about confidentiality are needed and what disclosures should be made to whom.

It is also true, however, that the mediator will need to be conversant with the confidentiality rules as situations, often unforeseeable ones, will rise (sic) during the course of the mediation raising those issues.

Before making disclosures and in aid of determining which disclosures would be most applicable, the administrator should attempt to acquire information which may suggest the need for certain disclosures. For example, the administrator should inquire from the employer or manager whether there are other employees in the workplace who are not parties to this claim being mediated but who might have a similar claim in the future and who might therefore be interested in what was said during the mediation. If that is the case, it would be important for the administrator to explain separately to the manager the circumstances of when

outsiders or strangers to a mediation may successfully discover what was said in a mediation. The obvious example is the joint session but there are others as well. It was (sic) also be important for the administrator to pass along that information to the mediator or neutral.

Another example is if the administrator makes inquiry of the employee and determines that there is a possibility that the employee may reveal information suggesting inappropriate or possibly illegal behavior on the part of others in the workplace. In that situation, the administrator should advise the employee that the disclosure of that information may under certain circumstances not be protected by confidentiality in the mediation. It would be helpful if the administrator knew and could describe exactly what those circumstances are.

Response: This comment expresses an opinion on how an ADR program administrator should function to ensure that parties are appropriately apprised of the confidentiality provisions of the ADR Act. While creating such specific obligations may be appropriate in some agencies, the role of ADR program administrators differs among agencies. In some agencies, the responsibility to educate the parties regarding confidentiality falls to the session mediator, rather than the program administrator.

The lack of specific instructions for the ADR program administrator in this Confidentiality Guide is intentional. The challenge posed to the drafters was to describe the various aspects of confidentiality requiring explanation, while still offering flexibility for agencies to determine how to most appropriately complete this task. Additionally, the drafters believe that flexibility is important because this guide is designed to be used in concert with the confidentiality provisions of the ADR Act, as well as agency confidentiality policies and guidance.

Other suggestions of the commenter, such as the need to identify appropriate documents or other persons who might have a similar claim, are beyond the scope of this guidance.

Comment:

This issue (i.e. – where an employee reveals information suggesting inappropriate or possibly illegal behavior on the part of others in the workplace) is raised in the answer A8 in the Guide involving the disclosure by a party to a neutral that the party has abused his government credit card by using it for personal purchases. The solution offered by the Guide indicated that despite the neutral’s belief that a violation of a government regulation prohibiting fraud, waste and abuse has occurred, the neutral is advised by the administrator that under the ADR Act there is no basis for the neutral’s disclosure of that admission.

I disagree with the solution provided by the Guide. Title 5 U.S.C. §574(a)(4)(B) contains an exception to confidentiality if a court determines that the testimony of a disclosure is necessary to help establish a violation of law and the disclosure outweighs the interest in preserving confidentiality in mediations.

Response: Under the ADR Act, there is no applicable exception to justify the neutral’s

disclosure of this information.

Based on the suggested comment, the drafters added the word “However” to the second sentence of the Solution to the first Dilemma under A8 to clarify that the program administrator should further explain actions that the mediator can take based on any agency policy regarding the tension between the ADR Act and other statutes requiring disclosure.

Comment:

Another example in the Guide involves an accusation privately made by an employee that a manager, not involved in the mediation, is guilty of harassment. See A8. The accusation is conveyed by the mediator to the supervisor, Angie, in the mediation who advises the mediator that a preliminary inquiry must be commenced to determine if that is true. The Guide’s solution is that the supervisor may not disclose this information because there is no applicable exception to the general rule of mediation confidentiality in this instance.

Assuming that the harassment is of a type which would be illegal (i.e. sexual), I disagree with that conclusion. In my view, the applicable exception is the §574(b)(5)(B) “help establish a violation of law” exception.

Response: There may be other ways for the supervisor, Angie, to initiate an audit into the general question of whether harassment in the workplace was occurring. Such a discussion, however, would be outside the scope of this Confidentiality Guide, which focuses on the duties of ADR program administrators and their responsibilities to neutrals. If, in fact, this scenario does involve an illegal act, the ADR program administrator still could not disclose information without a court order, after the court had applied the balancing act set forth in 574(b)(5)(B).

Comment:

I would like to urge the Working Group to set forth with greater detail the underlying reasons for the difference in opinion among practitioners regarding the enforceability of agreements which increase the confidentiality protections beyond those provided by the ADRA.

Response: This comment requests that the Confidentiality Guide clarify the current difference of opinion over the enforceability of confidentiality agreements. The Confidentiality Guide cannot do so, because the paucity of relevant case law does not enable the drafters to offer reliable guidance beyond what has already been provided. Until a court interprets the issue and offers clearer guidance, this Confidentiality Guide must be open to individual agency interpretation.

(2) Commenter #2:

Comment:

Pages 8 (A1) and 16 (A2): Discussion indicates that ADR program administrators are “neutrals” in certain circumstances, which make them subject to ADR Act confidentiality requirements. However, since the ADR program administrator is likely to be the most knowledgeable person about the ADR process, the chief architect of policies and procedures, the person responsible for implementing ADR practices—potentially, including in specific matters—the point of contact on ADR with the agency’s general counsel, and the person who will field questions from mediators, other neutrals, and the parties, it seems likely that the program administrator will usually be a neutral. If so, it would be helpful for the guide to so indicate to try to make those persons’ jobs clearer and easier.

Response: This comment focuses on the role of the ADR program administrator as neutral. Though an ADR program administrator can under certain circumstances be a neutral as that term is used in the ADR Act, duties of ADR program administrators differ greatly across agencies. The ADR program administrator, at any particular time, may be serving the needs of the parties to a dispute or may be serving the needs of the organization as a whole. Because of the variation in such roles, from case to case and from agency to agency, the Confidentiality Guide cannot indicate definitively to what extent any program administrator serves in the role of a neutral.

In response to the comment, however, the definition of “ADR Program Administrator” (Introduction; page 3) has been modified to reflect these variations in roles.

Comment:

Pages 14 and 15 (A8 and related “dilemmas and solutions”): In general, this entire section is confusing. The discussion refers to “exceptions” to the ADR Act’s preclusion of disclosing dispute resolution communications; yet—in spite of their obvious importance—none of the exceptions are described, even in summary fashion.

Notwithstanding, one of the solutions states that the mediator may not disclose the existence of a violation of “ethics regulations” prohibiting fraud, waste and abuse, which violation may also quite possibly be a crime—such solution implying that an “ethics violation” or, perhaps, criminal conduct are not one of the exceptions. Moreover, this solution is inconsistent with the “Draft Ombuds Guide,” which states, “[A]ll federal employees, including Ombuds, are obligated to report incidents of fraud, waste and abuse...”

Response: This comment requests that the Confidentiality Guide clarify the relationship between ADR Act confidentiality provisions and other laws and regulations that authorize access to, or reporting of, certain classes of information. The Confidentiality Guide cannot do so because the paucity of relevant case law does not enable the drafters to offer reliable guidance beyond what has already been provided. The Confidentiality Guide, therefore, endorses a cooperative approach where the ADR program and requesting parties establish good working relationships such that disputes

over demands for disclosure of confidential communications can be minimized. Likewise, the Guide for Federal Employee Ombuds, as modified based on public comment, recognizes a potential conflict in obligations and suggests that an Ombuds seek competent and impartial legal counsel when requested to disclose potentially confidential information.

Comment:

Page 15: The discussion could be clarified by adding the words, “in the absence of a confidentiality agreement” to the caption, “When allegations are made in joint session,” at the bottom of the page.

Response: Adding clarifying words to that caption would require changes to other captions. By omitting “*in the absence of a confidentiality agreement*,” the Confidentiality Guide emphasizes that the default scenario is one in which there is no confidentiality agreement.

Comment:

Page 3: The description and citation of the preexisting guidance (“the 2000 ADR Guidance”) is different than that contained in the October 17, 2005 “Draft Mediator’s Guide,” page 9, even though both the “Draft Confidentiality Guide” and the “Draft Mediator’s Guide” appear to be referring to the same document. Recommend conforming the description and citation.

Response: The noted citation to the 2000 ADR Guidance has been corrected to 65 Federal Register 83085. The language of this Confidentiality Guide has also been modified to describe the 2000 ADR Guidance as a guidance issued by the U.S. Attorney General’s Federal ADR Council and makes reference to the www.adr.gov website.

Comment:

Throughout: Recommend use of more “ethically (sic) neutral” names.

Response: Based on the suggested comment and suggestions of Steering Committee members, some names used in the Guide have been changed to more accurately reflect the ethnic diversity of workplace programs.

Comment:

The use of the words “ensure[d]” or “insure[d]” is not wise, because both unrealistically suggest certainty or guarantee. Recommended substitutes like, “provided for,” “checked,” “instructed,” “insisted,” “demanded,” “requested,” etc or “assured” which is a bit less certain.

Response: Based on the suggested comment and suggestions of Steering Committee members, language has been changed throughout the Guide to more consistently reflect the intent of the drafters. Examples of these changes can be seen in the language of the

introductory paragraph to each chapter and the format of the chapter Summary Checklists.

Other Changes:

As indicated above, limited additional changes were made throughout the Guide to provide consistency of language and more accurately indicate the intent of the drafters. These changes were of a clarifying nature and do not change the substance or focus of the Guide. As clarified in the language of the Introduction, the intent of the Guide is to encourage the integration of the ADR Act and its legislative intent with agency policy and practice, and to provide helpful advice on potentially difficult questions to ADR program administrators engaged in workplace ADR.